

RECORD

The record considered by the Appeals Board is the same as that specifically set forth in the January 21, 1994, Award of Special Administrative Law Judge William F. Morrissey.

STIPULATIONS

The stipulations of the parties are the same as those specifically set forth in the January 21, 1994, Award of Special Administrative Law Judge William F. Morrissey.

ISSUES

In this proceeding the Special Administrative Law Judge found that claimant was entitled to permanent general disability benefits based upon a forty (40%) work disability as a result of an injury to the right shoulder occurring on November 20, 1990. The respondent and insurance carrier have requested this review and allege that the Special Administrative Law Judge erred in his finding of the amount of work disability and claimant's average weekly wage. These are the two issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, the Appeals Board finds:

(1) The parties stipulated that on November 20, 1990, claimant injured his right shoulder by reason of an accident that arose out of and in the course of his employment with the respondent. As a result of his November 1990 injury, the Appeals Board finds that claimant is entitled to permanent partial general disability benefits based upon a thirty-two percent (32%) work disability as established by the unique facts and circumstances of this case.

Based upon the testimony of vocational rehabilitation expert James Molski, the claimant has lost approximately eighteen percent (18%) of his ability to perform work in the open labor market as a result of the injury to the right shoulder. Mr. Molski believes that as a result of the injury to the right shoulder and a subsequent injury to the left shoulder one month later, claimant has lost approximately fifty-five percent (55%) of his ability to perform work in the open labor market. Mr. Molski believes one-third of that loss is solely attributable to the right shoulder injury. The Appeals Board finds Mr. Molski's analysis to be persuasive as he believes that injury to both shoulders is more limiting in terms of employment than injury to only one shoulder. The Appeals Board is cognizant of the testimony of labor market expert Don E. Vander Vegt who testified that claimant had lost approximately fifty percent (50%) of his ability to perform work in the open labor market due to the right shoulder injury and a fifty-percent (50%) loss of ability to perform work in the open labor market due to the left shoulder injury. The Appeals Board rejects Mr. Vander Vegt's analysis.

For the reasons stated below in Paragraph (2), the Appeals Board finds that claimant has lost approximately forty-six percent (46%) of his ability to earn comparable wage as a result of the right shoulder injury. This loss is based upon a pre-injury average weekly wage of \$742.59 as determined by the Special Administrative Law Judge and an estimated post-injury ability to earn \$400.00 per week.

Averaging the two loss factors, as was done in *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990), results in a thirty-two percent (32%) work disability for which claimant is entitled to permanent partial general disability benefits.

(2) The Appeals Board finds that claimant has retained the ability to earn approximately \$400.00 per week when considering his injury to the right shoulder. This finding is based upon the testimony of claimant's labor market expert, Don E. Vander Vegt, who testified that \$400.00 per week is reflective of claimant's post-injury ability to earn wages.

The respondent requests the Appeals Board to find that claimant has the post-injury ability to earn \$514.74 per week as that is the amount set forth in claimant's submission brief as being claimant's gross receipts for the thirty-seven (37) week period through October 16, 1992. The Appeals Board does not accept that figure as being reflective of claimant's ability to earn wages as it fails to take into consideration mileage, long-distance, and insurance expense claimant incurred to earn those gross receipts. As the parties are aware, claimant returned to work for the respondent not as a delivery driver but as a salesman for which he is responsible for his own expenses.

Respondent contends Conklin v. Topeka Wholesale Grocery Co., 183 Kan. 458, 327 P.2d 860 (1958) controls and, therefore, requires the inclusion of out-of-pocket expenses in determining average weekly wage. The Appeals Board disagrees. A reading of the Conklin case indicates that the Kansas Supreme Court in that proceeding was interpreting General Statutes of Kansas 1955 Supp. 44-511. After the Conklin decision the Legislature modified K.S.A. 44-511. A more recent decision of the Kansas Court of Appeals is Ridgway v. Board of Ford County Comm'rs, 12 Kan. App. 2d 441, 748 P.2d 891 (1987) which indicates that the determination of average weekly wage is to be based upon an analysis of economic gain rather than gross receipts. However, as the Appeals Board has found that \$400.00 per week is reflective of claimant's post-injury ability to earn wages, as indicated above, we do not need to further analyze the appropriate offsets to the gross amounts paid to claimant as they would clearly result in an income of less than \$400.00 per week.

(3) The Appeals Board hereby adopts and incorporates by reference the findings of fact and conclusions of law as set forth in the Award of Special Administrative Law Judge William F. Morrissey dated January 21, 1994, that are not inconsistent with the findings specifically made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision of Special Administrative Law Judge William F. Morrissey set forth in his Award of January 21, 1994, is modified as follows:

An award of compensation is hereby made in accordance with the above findings in favor of the claimant, Michael K. Brenneman, and against the respondent, Mid Central Sysco Food Service, and the insurance carrier, Employers Insurance of Wausau, for an accidental injury sustained on November 20, 1990, and based upon an average weekly wage of \$742.59 for 415 weeks of compensation at the rate of \$158.42 for a 32% permanent partial general bodily disability making a total award of \$65,744.30.

As of May 16, 1994, there would be due and owing to the claimant 182 weeks permanent partial compensation at \$158.42 per week in the sum of \$28,832.44. The remaining 233 weeks of compensation are to be paid at the rate of \$158.42 per week until fully paid or until further order of the Director.

The remaining orders of Special Administrative Law Judge William F. Morrissey as set forth in his Award of January 21, 1994, are adopted as if fully set forth herein.

IT IS SO ORDERED.

Dated this ____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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William F. Morrissey, Special Administrative Law Judge
George Gomez, Director